Supreme Court, U.S.
FILED
DEC 6 1985
JOSEPH F. SPANIOL, JR.
CLERK

NO. 85-806

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1985

RICKY G. ELLIOTT,

Petitioner,

vs.

THE STATE OF OHIO,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE FIRST APPELLATE DISTRICT OF OHIO

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QUESTIONS PRESENTED

I

WHETHER A FEDERAL DISTRICT COURT'S DECISION CONCLUDING THAT PROBABLE CAUSE WAS LACKING FOR THE ISSUANCE OF A SEARCH WARRANT BINDS ANY STATE COURT WHERE THE TWO COURTS, UNDER TWO CRIMES PROSECUTED BY DIFFERENT AUTHORITIES, UNDER DIFFERENT STATUTORY LAW, DIFFERENTLY INTERPRET THE APPLICABLE CASE LAW OF THE UNITED STATES SUPREME COURT.

II

WHETHER SUPPRESSION OF EVIDENCE IS MANDATED WHEN A POLICE OFFICER, IN GOOD FAITH, RELIES UPON A NEUTRAL AND DETACHED MAGISTRATE'S DETERMINATION THAT PROBABLE CAUSE EXISTS FOR THE ISSUANCE OF A SEARCH WARRANT.

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OPINIONS BELOW

The decision of the First Appellate District of Ohio at issue was released on December 26, 1984. This unreported decision, and the Ohio Supreme Court's September 11, 1985 entry declining to accept the case for review, are accurately set forth as appendices in the brief of the petitioner.

JURISDICTION

The entry denying review by the Supreme Court of Ohio was journalized on September 11, 1985. The petitioner invokes the jurisdiction of this Court under 28 U.S.C. 1257(3).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

ARTICLE VI, UNITED STATES CONSTITUTION:

Article VI of the United States Constitution provides, in pertinent part:

> This Constitution, and the Laws of the United States which shall be made in pursuance thereof; . . . shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary nothwithstanding.

FOURTH AMENDMENT, UNITED STATES CONSTITUTION:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath of affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

FOURTEENTH AMENDMENT, UNITED STATES CONSTITUTION:

> Section 1. . . . nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

ARTICLE I, OHIO CONSTITUTION:

> § 14, Search warrants and general warrants.
>
> The right of the people to be secure in their persons, houses, papers, and possessions, against unreasonable searches and seizures shall not be violated; and no warrant shall issue, but upon probable cause, supported by oath or affirmation, particularly describing the place to be searched and the person and things to be seized.

STATEMENT OF THE CASE

A) Procedural Posture:

On February 9, 1984, the Hamilton County, Ohio, Common Pleas Court denied the petitioner's Motion to Suppress after hearing arguments from each side. Petitioner plead No Contest to Trafficking in Drugs and appealed the denial of his motion to the First District Court of Appeals of Ohio. On December 26, 1984, the appellate court affirmed the trial court's rulings. The Supreme Court of Ohio declined to review the holdings of the Court of Appeals on September 11, 1985. From this ruling, petitioner has instituted the pending Petition for Writ of Certiorari to the First District Court of Appeals.

B) Statement of the Facts

The facts of the instant case are wholly set out in the affidavit and search warrant issued on August 12, 1983:

> "Due to anonymous citizens [sic] complaints concerning drug activity, on the afternoon of August 11, 1983 at approximately 2:00 pm affiant picked up two sealed garbage bags which were abandoned at the curb side located in front of 1102 Madeline Circle, the residence of Rick Elliott. Affiant thoroughly searched through both sealed bags and found a quantity of partially smoked marijuana cigarettes and several stems from marijuana stalks, portions of which were field tested by affiant and found to test positive for marijuana. Also found were personal papers indicating the garbage was the discarded propety [sic] of Rick Elliott, 1102 Madeline Circle. Affiant having been a police officer for over 4½ years and a narcotics investigator for over 1½ years has had numerous contacts with marijuana and is familiar with its appearance and the normal packaging and pattern for its distribution. Affiant has observed several vehicles which have visited the described premises and stayed for only a short period of time which is, to affiant, the normal pattern for drug related activity."

Based upon these facts, a Judge of the Hamilton County Municipal Court determined that the affiant had established probable cause and issued the search warrant. Upon execution of the warrant, the following contraband was seized: two bags of marijuana seeds, thirty-four (34) bags of marijuana, a bag of "roaches" (or partially consumed marijuana cigarettes), 18 pipes, a spoon, hemostats, three scales, vials, 27 Valium tablets, 34 Datril tablets, a pistol and silencer, and various other preparatory materials.

The pistol and silencer led to criminal charges in the United States District Court while the remaining contraband resulted in criminal charges under Ohio law.

Federal District Judge S. Arthur Spiegel ordered the gun and silencer suppressed as indicated in his Opinion reported at 576 F. Supp. 1581. The Honorable Simon L. Leis, Jr. of the Hamilton County Court of Common Pleas decided otherwise:

> "THE COURT: I don't deny the fact that they have a close issue here, Mr. Shiverdecker. I think it is a close one, but I also believe in (sic) courts should apply common sense in reaching a decision, common sense interpretation of the search warrant.
>
> I think the fact is: an anonymous tip, observation by the officer of cars stopping, people going in, people coming out, and the fact that marijuana and stems were found in the defendant's garbage because his name was apparently in the garbage. . . . But that in and of itself, as far as this Court is concerned, using the principle of common sense is sufficient for a search warrant. So, I am going to overrule your motion." (Transcript of Proceedings at page 26)

REASONS FOR DENYING THE WRIT

THE DECISION OF THE FIRST DISTRICT COURT OF APPEALS IS IN COMPLETE ACCORD WITH THE RULINGS OF THIS COURT. THEREFORE, PROCEEDINGS UNDER THE LAWS OF OHIO AGAINST PETITIONER FOR POSSESSION OF DRUGS AND CONTRABAND ARE NOT GOVERNED BY A FEDERAL TRIAL COURT'S RULING IN A CASE WHERE THE STATE OF OHIO IS NOT A PARTY, THE PETITIONER IS CHARGED WITH A FEDERAL CRIMINAL FIREARMS VIOLATION, AND NO FEDERAL NARCOTICS CHARGES ARE INVOLVED, AND THE FEDERAL COURT RELIED UPON INFERIOR FEDERAL COURT DECISIONS AS GOVERNING AUTHORITY.

FIRST ISSUE

THE SUPREMACY CLAUSE OF THE UNITED STATES CONSTITUTION MANDATES THAT INFERIOR TRIBUNALS FOLLOW THE RULINGS OF THE UNITED STATES SUPREME COURT ON FEDERAL CONSTITUTIONAL QUESTIONS.

SECOND ISSUE

A STATE COURT IS NOT BOUND BY A FEDERAL DISTRICT COURT'S DECISION ON A FEDERAL QUESTION, BUT SHOULD CONSIDER THAT DECISION WITH GREAT WEIGHT IN REACHING ITS INDEPENDENT DECISION.

The well-established constitutional principle that the United States Supreme Court's interpretation of the rights afforded individuals under the United States Constitution are binding on all lower state and federal courts is not at issue in this Petition. The heart of the presented question is whether a federal District Court's ruling, made under different authorities and differing interpretation of authorities, is binding on every state appellate court.

The Supremacy Clause states that the "Constitution, and Laws of the United States . . . and all Treaties made . . . shall be the supreme Law of the Land." The question herein asks the definition of "Laws of the United States." There is no question that when the federal government pre-empts the field of the subjected matter, federal statutory law must be applied where it conflicts with state law. *Gibbons* v. *Ogden*, 9 Wheat. 1 (1824). As previously stated, case law enunciated by the Supreme Court also binds all inferior courts. The question then arises: what is the binding effect of inferior federal courts' case law on state courts?

Courts differ on the answer to this question. Many courts hold that lower federal court decisions are not *binding* on state courts. *Robertson Lumber Co.* v. *Progressive Contractors, Inc.*, 160 N.W. 2d 61 (N.D. 1959), app. dismd and cert. den. 394 U.S. 714; *State* v. *Coleman*, 46 N.J. 16, 214 A. 2d 393, 403 (1965), cert. den. 383 U.S 950; *United States, ex rel. Lawrence* v. *Woods*, 432 F. 2d 1072 (7th Cir. 1970); *State* v. *Dwyer*, 332 So. 2d 333 (1976); *Cooper* v. *Morin*, 398 N.Y.S. 2d 36, 53 (1977). The following rationale, used by the New Jersey Supreme Court, is particularly applicable in the case *sub judice*:

> "In the course of its decision, the Third Circuit went beyond the actual holding in Escobedo and construed the Supreme Court's opinion as broadly invalidating confessions such as those made by the defendants Russo and Bisignano while in custody and without counsel, no request for counsel having been made by them. The view thus expressed, while binding in Russo (subject to any further review in the Supreme Court), is not binding on us in other cases which come before us in the exercise of our acknowledged State jurisdiction. In passing on federal constitutional questions, the state courts and the lower federal courts have the same responsibility and occupy the same position; there is parallelism but not paramountcy for both sets of courts are governed by the same reviewing authority of the Supreme Court. 28 U.S.C.A.

§§ 1254, 1257 (1949)." (citation omitted) *State* v. *Coleman*, supra at 403.

Therefore, it is respectfully submitted that when a conflict arises between the decisions of lower federal courts and state courts, the state courts should consider the decisions of the federal courts with great respect and persuasion, but are not required to give it controlling weight. This conclusion is logical because the state trial court's actions are reviewable by the state appellate courts with a final appeal available by this Court. Nowhere does a federal district or circuit court review a state court's actions. Likewise, a state tribunal does not review the actions of a federal district or circuit court.

The petitioner's contention that a federal trial court judge can bind all state courts with a decision underscores that entirely different parties were involved in each of the cases. The federal charge was prosecuted by the U.S. Attorney's Office. The state charge involved the Hamilton County Prosecutor. Elliott was charged under both federal and state law for crimes resulting from the items seized pursuant to the same warrant. This was clearly permissible. *United States* v. *Wheeler*, 435 U.S. 313 (1978); *Abbate* v. *United States*, 359 U.S. 187 (1959); *Bartkus* v. *Illinois*, 359 U.S. 121 (1959). Because different parties were involved in each case, the arguments advanced to each Court may have differed. The federal prosecutor may not have cited authority to the district court judge that warrants are to be read in a practical, non-technical, common-sense manner. The arguments of the state prosecutor may have been set forth with greater clarity and logic than his federal counterpart. In sum, there are many such reasons which could account for the different conclusions of the two courts.

The State of Ohio's Constitution has a section in its Bill of Rights pertaining to search warrants. Ohio Constitution, Art. I; Section 14. The Supreme Court has also promulgated Rules of Criminal Procedure which deal with search warrants. Therefore, because Ohio is a sovereign state, the guarantees

contained in its Bill of Rights will remain as interpreted in Ohio despite a narrowing federal interpretation of parallel guaranties of the United States Constitution and the Fourteenth Amendment. *Direct Plumbing Supply Co.* v. *Dayton*, 138 Ohio St. 540, 545, 38 N.E.2d 70 (1941). This is true because the state and federal systems parallel each other; the final arbiter of each being this Court.

This duality sometimes leads to differeing interpretations of the United States Supreme Court decisions. Not only do interpretations vary between state and federal courts, but even federal district and circuit courts do not interpret controlling cases alike.

The petitioner herein claims that the First District Court of Appeals of Ohio did not consider Judge Spiegel's decision in arriving at its decision. Despite his assertion that "Petitioner and the District Court did not even receive the benefit of the damnation with faint praise of the federal courts received by Glover," the state court duly considered and rejected the district court's decision. In a case decided some six months prior to this decision, the First District stated in *State* v. *Brown*, 20 Ohio App. 3d 36, __ N.E.2d __ (First Dist. 1984):

> "The second theory advanced by Brown to maintain his assertion that the motion to suppress should have been granted is premised upon the alleged absence of a factual basis sufficient to support the issuance of a search warrant for his apartment. Relying upon *United States* v. *Elliott* (S.D. Ohio 1984), 576 F. Supp. 1579, he contends that the discovery of the discarded contraband in the garbage bag was, standing alone, insufficient to support a finding of probable cause to search a specific apartment.
>
> The authority cited by Brown stikes us as being unduly exacting and restrictive, even from the standpoint of the interests that the Fourth Amendment are designed to protect, and we elect not to give it controlling weight. In our view, the issue confronting us is whether there was,

> from the totality of the facts and circumstances set forth in the affidavit accompanying the request for the warrant, a reasonable likelihood that contraband would be found in the premises to be searched. See *Illinois* v. *Gates* (1983), 462 U.S. 213; *Texas* v. *Brown* (1983), 460 U.S. 730. The resolution of the issue, in turn, calls for us to adopt a common-sense approach and to take into account considerations that are largely practical and nontechnical. See *United States* v. *Cortez* (1981), 449 U.S. 411; *United States* v. *Ventresca* (1965), 380 U.S. 102; *Brinegar* v. *United States* (1949), 338 U.S. 160." *State* v. *Brown*, supra at 38-39.

This decision demonstrates that each court relied upon differing authorities in making their respective rulings. The federal trial court granted the motion to suppress because the affidavit for a search warrant did not specify when the anonymous complaints were made or when the surveillance took place.

The state appellate court agreed with the state trial court's decision to overrule the motion to suppress on different grounds. Each state court paid great deference to the probable cause determination of the issuing magistrate and interpreted the affidavit in a non-technical, common-sense manner. To determine whether probable cause was present, the test applied was the one set forth in *Illinois* v. *Gates*, 462 U.S. 213 (1983).

> "In a case such as this where the constitutional validity of a search warrant depends upon the sufficiency of statements appearing in the supporting affidavit, it has often been said that the affidavit should be interpreted not in a hypertechnical, but in a common-sense manner, with great deference being paid by a reviewing court to the magistrate's determination of probable cause. *Illinois* v. *Gates* (1983), __ U.S. __, 103 S.Ct. 2317; *Spinelli* v. *United States* (1969), 380 U.S. 102, 85 S.Ct. 741; *Brinegar* v. *United States* (1949), 338 U.S. 160, 69 S.Ct.

1302. Under this approach, the question is whether, from all the facts and circumstances set forth in the affidavit, there is a 'fair probability' that contraband or evidence of a crime will be found if a particular place is searched. In this regard, the magistrate's determination should not be disturbed on appeal if the record discloses a substantial basis for concluding that probable cause did, in fact, exist. *Illinois* v. *Gates*, __ U.S. at __, 103 S.Ct. at 2332.

* * *

Giving the affidavit a common-sense reading in accordance with the prevailing rules of construction, we think it fair to say that the complaint about the drug activity, the discovery of the marijuana in the garbage and the observation of the visitors to the home were not isolated events, one temporally distant from the others. It appears that each may well have occurred at a time on or about August 11, 1983, only a day before the warrant was requested and issued. We are further convinced that the otherwise innocent appearance of the line of visitors entering and leaving the premises acquired a different, more incriminating light when viewed in the context of the investigating officer's training and experience and the other information contained in the affidavit." *State* v. *Elliott*, Hamilton App. No. C-840177, unreported at pp 4-6 (December 26, 1984).

After reviewing the state court decision and the federal district court's decision, it is clear that each court relied upon different authorities in making their differing pronouncements. The federal trial court suppressed the items on the authority of two circuit court decisions. The state court followed the authorities set forth by this Court in *Illinois* v. *Gates*, supra, *Texas* v. *Brown*, 460 U.S. 730 (1983), and *United States* v. *Cortez*, 449 U.S. 411 (1981).

Therefore, since each court made their determinations on different grounds and the state court opined using the ra-

tionale set forth by this Court's decisions, the Petition for Writ of Certiorari should be denied. The state court was correct in declining to follow the narrow, hypertechnical views of the federal trial court.

THIRD ISSUE

THE "GOOD-FAITH" EXCEPTION TO THE EXCLUSIONARY RULE ANNOUNCED IN *UNITED STATES v. LEON* IS APPLICABLE TO A CASE WHERE A POLICE OFFICER, ACTING IN GOOD FAITH, EXECUTES A SEARCH WARRANT ISSUED BY A NEUTRAL AND DETACHED MAGISTRATE.

In the second prong of the petitioner's argument, the Court is asked to review its recent decision of *United States* v. *Leon*, 468 U.S. __, 104 S.Ct. 3405 (1984), and overrule it. The petitioner's case is on all fours with *Leon*, and therefore, there is no need to "flesh out the decision of the Court."

First, it must be noted that each trial court made its decision prior to the release of the *Leon* decision. The federal district court refused reconsideration of its decision on the erroneous belief that *Leon* would not establish a "good faith" exception to the exclusionary rule. (See Appendix "D" to petitioner's brief) Counsel did not brief the issue of a "good-faith" exception with the First District Court of Appeals because each sides respective briefs were filed approximately a month prior to *Leon's* release. That court decided the case on the totality of circumstances based on a common-sense reading of the affidavit. It only cited the *Leon* case in a footnote.

Notwithstanding the above, the "good faith" exception to the exclusionary rule would be applicable in the instant case. The case of *United States* v. *Leon* is factually identical to the petitioner's case. Both cases involved the execution of a search warrant in good faith by police officers after a judge determined that the supporting affidavit established probable cause. Subsequently, the trial courts ruled that the affidavits

did not set forth sufficient information to rise to the level of probable cause. Since the exclusionary rule was adopted to prevent police misconduct and none was present under the facts, this Court carved out the "good faith" exception.

Petitioner intimates that the police must be guilty of intentional misconduct because the affidavit is silent as to time. This argument completely ignores the rule that a neutral and detached magistrate must review the affidavit prior to issuing the search warrant. It also throws the magistrate's option to require the affiant to personally appear and answer questions by the wayside. Ohio Crim. R. 41(C).

The record does not support *any* contention that the issuing magistrate abandoned his neutral and detached role as the decider of probable cause. The record does not indicate that the magistrate served as a rubber stamp for law enforcement officials. If it is "well known among the defense bar that there are some judges who would sign a blank check if proffered by an officer in uniform," then counsel had a duty to raise this issue in the trial court, court of appeals and Ohio Supreme Court before boldly making such assertions before the highest Court of the land.

CONCLUSION

Following a review of the decisions of District Court Judge Spiegel and the First District Court of Appeals, it is readily evident that the two courts made their decisions from differing bases. One was an unduly exacting, technical and restrictive interpretation of the principles set forth in the federal Constitution. The other looked at the totality of the facts and circumstances in a common-sense approach while paying deference to the issuing magistrate's decision. As such, this Court should not grant the petitioner's applicaton for a Writ of Certiorari to compel the appellate courts of Ohio to blindly follow one decision of a federal trial judge.

This Court is respectfully requested to deny the Petition for a Writ of Certiorari and allow justice to be served.

Respectfully submitted,

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APPENDIX A

OHIO RULES OF CRIMINAL PROCEDURE

RULE 41. Search and Seizure

(A) Authority to issue warrant. A search warrant authorized by this rule may be issued by a judge of a court of record to search and seize property located within the court's territorial jurisdiction, upon the request of a prosecuting attorney or a law enforcement officer.

(B) Property which may be seized with a warrant. A warrant may be issued under this rule to search for and seize any: (1) evidence of the commission of a criminal offense; or (2) contraband, the fruits of crime, or things otherwise criminally possessed; or (3) weapons or other things by means of which a crime has been committed or reasonably appears about to be committed.

(C) Issuance and contents. A warrant shall issue under this rule only on an affidavit or affidavits sworn to before a judge of a court of record and establishing the grounds for issuing a warrant. The affidavit shall name or describe the person to be searched or particularly describe the place to be searched, name or describe the property to be searched for and seized, state substantially the offense in relation thereto, and state the factual basis for the affiant's belief that such property is there located. If the judge is satisfied that probable cause for the search exists, he shall issue a warrant identifying the property and naming or describing the person or place to be searched. The finding of probable cause may be based upon hearsay in whole or in part, provided there is a substantial basis for believing the source of the hearsay to be credible and for believing that there is a factual basis for the information furnished. Before ruling on a request for a warrant, the judge may require the affiant to appear personally, and may examine under oath the affiant and any witnesses he may produce. Such testimony shall be admissible at a hearing on a motion to suppress if taken down by a court reporter or recording equipment, transcribed and made part of the af-

fidavit. The warrant shall be directed to a law enforcement officer. It shall command the officer to search, within three days, the person or place named for the property specified. The warrant shall be served in the daytime, unless the issuing court, by appropriate provision in the warrant, and for reasonable cause shown, authorizes its execution at times other than daytime. The warrant shall designate a judge to whom it shall be returned.

(D) **Execution and return with inventory.** The officer taking property under the warrant shall give to the person from whom or from whose premises the property was taken a copy of the warrant and a receipt for the property taken, or shall leave the copy and receipt at the place from which the property was taken. The return shall be made promptly and shall be accompanied by a written inventory of any property taken. The inventory shall be made in the presence of the applicant for the warrant and the person from whose possession or premises the property was taken, if they are present, or in the presence of at least one credible person other than the applicant for the warrant or the person from whose possession or premises the property was taken, and shall be verified by the officer. The judge shall upon request deliver a copy of the inventory to the person from whom or from whose premises the property was taken and to the applicant for the warrant. Property seized under a warrant shall be kept for use as evidence by the court which issued the warrant or by the law enforcement agency which executed the warrant.

(E) **Return of papers to clerk.** The judge before whom the warrant is returned shall attach to the warrant a copy of the return, inventory, and all other papers in connection therewith and shall file them with the clerk.

(F) **Definition of property and daytime.** The term "property" is used in this rule to include documents, books, papers and any other tangible objects. The term "daytime" is used in this rule to mean the hours from 7:00 a.m. to 8:00 p.m.